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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

YOLANDA EVERT, individually and as the)	
Qualified Wrongful Death Representative)	
Of Erwin Evert, deceased,)	
)	
Plaintiff,)	
)	
v.)	No. 11-CV-339-F
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

**OBJECTIONS TO VARIOUS EXHIBITS SUBMITTED WITH
PLAINTIFF'S OPPOSITIONS TO DEFENDANT'S DISPOSITIVE MOTIONS**

The United States, by and through the United States Attorney for the District of Wyoming and Assistant United States Attorneys C. Levi Martin and Nicholas Vassallo, hereby objects¹ to several exhibits plaintiff attached to its oppositions to Defendant's dispositive motions.

¹ Under the 2010 amendments to the Federal Rules of Civil Procedure, an objection, as opposed to a separate motion to strike, is the appropriate procedure for challenging inadmissible evidence

Plaintiff seeks, though various submissions, to present inadmissible evidence for this Court's consideration in deciding the dispositive motions filed by the United States. The subject documents are as follows:

I. Recommendations of Investigative Team

Under the guise of directing this Court to the Shoshone National Forest closure order, plaintiff submits an unredacted version of the Investigative Team Recommendations. (Dkt. #43 at 7, citing Dkt. #43-8 (Pl's Ex. 6)); Dkt. # 47 at 5, citing Dkt. # 47-18 (Pl's Ex. 12)). This submission violates FRE 407. "When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction." FRE 407. There is no purpose in providing the recommendations portion of the exhibit other than in an attempt to prejudice this Court. The United States objects to this patently inadmissible evidence.

II. Unsworn Reports

A. McCrory Report

With its opposition to the United States' motion for summary judgment based on Wyoming's recreational use statute, plaintiff submitted the report from Wayne McCrory (Dkt. # 47 at 7 & 14, citing Dkt. #47-9 (Pl's Ex. 6)). There are several objections to the inclusion of this

at the summary judgment stage. Fed.R.Civ.P. 56(c)(2) advisory committee's note ("objection functions much as an objection at trial, adjusted for the pretrial setting" and "[t]here is no need to make a separate motion to strike").

report. First, it is an unsworn statement.² Further, it contains multiple layers of hearsay. Additionally, its full inclusion is unnecessary for the purposes for which the plaintiff offers it. Plaintiff's only purported use of the report is to show two pictures—(1) a 2011 picture of a small horse group riding on the Kitty Creek trail (not the decommissioned spur-so at least a half a mile from the former research site) (Dkt. #47 at 7, citing Dkt. # 47-9 (Pl's Ex. 6 at 28)); and (2) a 2011 picture of plaintiff's counsel pointing to what McCrory speculates are bear #646's claw marks on a tree (Dkt. #47 at 14, citing Dkt. # 47-9 (Pl's Ex. 6 at 27)). The inclusion of the full report is another attempt to have this Court review inadmissible evidence. The United States does not object to this Court's consideration of the two photos actually referenced in plaintiff's opposition, despite their questionable relevance. However, this Court should not consider the remainder of McCrory's unsworn report.

B. Cattet Report

The plaintiff also submitted the report of Dr. Cattet with its opposition to the motion for summary judgment based on Wyoming's recreational use statute. (Dkt. #47 *passim*, citing Dkt. #47-24).³ The United States objects to this submission on the same ground as that lodged regarding the McCrory report—it is an unsworn statement. *Riggs*, 497 F.3d at 1121 (10th Cir.

² “[H]earsay testimony is inadmissible ‘in support of, or opposition to, summary judgment.’” *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1121 (10th Cir. 2007), quoting *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1555 (10th Cir.1995) (noting that “[o]ther circuits have held that a court may not consider hearsay evidence in depositions submitted to defeat summary judgment and the Supreme Court impliedly adheres to this rule”).

³ Plaintiff did not assign Cattet's report an exhibit number, but instead refers to it throughout the opposition as “Cattet Report”.

2007) (“[H]earsay testimony is inadmissible ‘in support of, or opposition to, summary judgment’”).

More importantly, however, Dr. Cattet has, since the creation of his report, disowned the ultimate conclusion upon which the plaintiff heavily relies—that “the recent capture and handling of Bear #646 ma[de] it more likely to attack someone than if it had not been recently handled and captured.” (Dkt. #47-24 at 24). Plaintiff paraphrased Cattet’s speculative hypothesis when stating “sudden aggressive behavior shown by Bear #646 toward Erwin was predictably due to severe stress and trauma.” (Dkt. #47 at 14).

At his deposition, however, Dr. Cattet admitted he had no scientific basis to make that statement.

Q. (BY MR. MARTIN) What made it more likely that Bear 646 was going to attack someone as opposed to flee from someone?

A. I would not know what makes it more likely to attack versus to flee. What I do know is that based on what the animal had gone through it would be likely to elicit stress response. But what that stress response is, that immediate response, whether it’s fight or flight, I don’t know. I don’t know what goes through a bear’s mind. And I don’t think there’s any scientific knowledge available out there that could say with certainty.

(Attach. 1 (Cattet Depo. 154:21-155:7)). Dr. Cattet further admitted that his theory of a recently captured and handled bear as being more likely to attack than flee was “the best speculation” he could make. (Cattet Depo. 157:8-157:21).

As this Court is fully aware, “an expert’s scientific testimony must be based on scientific knowledge, which implies a grounding in the methods and procedures of science based on actual

knowledge, not subjective belief or *unsupported speculation*.” *U.S. v. Rodriguez-Felix*, 450 F.3d 1117, 1123 (10th Cir. 2006) (citations and internal quotations omitted) (emphasis added). This Court should refuse to consider Dr. Cattet’s unsworn report.

III. Cattet video of other bears in leg hold snares.

The United States objects to video footage, generated by plaintiff’s expert, of other bears in leg hold snares. (Dkt. #47 at 14).⁴ The exhibit lacks foundation and plaintiff will be unable to meet its burden of demonstrating “the material is admissible as presented or to explain the admissible form that is anticipated.” Fed.R.Civ.P. 56(c)(2) advisory committee’s note.

The context in which the plaintiff cites to the Cattet video demonstrates it is merely an attempt to prejudice this Court. *See* Dkt. #47 at 14 (asserting bear #646 was attempting to escape the leg hold snare). There has been no dispute that bear #646 attempted to escape the snare and as a likely result had a swollen paw. Indeed, there is admissible evidence upon which plaintiff could rely to establish that fact. Yet, plaintiff seeks to submit evidence of other bears attempting to escape other snares simply to either confuse the issues and/or prejudice this Court against the use of leg hold snares generally. The relevancy is zero, and the prejudice and possibility of confusion is high. *See* F.R.E 403 (“court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice [and] confusing the issues”). Accordingly, this Court should not consider the irrelevant video of other bears in snares.

⁴ Plaintiff did not assign Cattet’s video an exhibit number, but instead refers to it as “Cattet Video.”

For the reasons stated above, in deciding the pending dispositive motions, this Court should not consider the Recommendations of the Investigation Team (Dkt. #43-8 (Pl's Ex. 6) & Dkt. # 47-18 (Pl's Ex. 12)); McCrory's unsworn report (Dkt. # 47-9); Cattet's unsworn report; and Cattet's video.

Respectfully submitted this 18th day of October, 2012.

CHRISTOPHER A. CROFTS
United States Attorney

By:

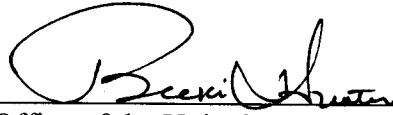

C. LEVI MARTIN
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing **OBJECTIONS TO VARIOUS EXHIBITS SUBMITTED WITH PLAINTIFF'S OPPOSITIONS TO DEFENDANT'S DISPOSITIVE MOTIONS** has been served upon the following by the method(s) indicated below on October 18, 2012.

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☐ By U.S. Mail - postage prepaid
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☐ By Overnight Courier
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Office of the United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Civil Action No. 11CV00339-F

YOLANDA EVERT, individually and as the
Qualified Wrongful Death Representative
of Erwin Evert, deceased,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DEPOSITION OF MARC CATTET, DVM, Ph.D.
October 5, 2012

Deposition location: 455 Sherman Street, Suite 250
Denver, Colorado 80203

APPEARANCES:

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For the Defendant

1 The deposition of MARC CATTET, DVM, Ph.D.,
2 called for examination by the Defendant, was taken in
3 the offices of Avery Woods Reporting, 455 Sherman
4 Street, Suite 250, Denver, Colorado, commencing at
5 10:02 a.m. on the 5th day of October, 2012, before
6 Deborah A. Glennon of Avery Woods Reporting Service,
7 Inc., 455 Sherman Street, Suite 250, Denver, Colorado
8 80203, a Registered Professional Reporter and a Notary
9 Public in and for the State of Colorado, pursuant to
10 the Federal Rules of Civil Procedure.

11 *****

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1 dosage. Conversely, five may be a low dosage for a
2 very tolerant -- an animal that's very tolerant to that
3 drug, or a five may be very -- it may be an overdose to
4 an animal that's very sensitive to it. So the concept
5 of dosages, a fixed number, is a bit misleading.

6 Q. Okay. Next I guess I would like to talk
7 a little bit about what appears to be the question you
8 either developed or were asked to answer. And that
9 was, "Did the recent capture and handling of Bear 646
10 make it more likely to attack someone than if it had
11 not been handled or recently handled and captured?"
12 Was that your hypothesis throwing out there, or was
13 that the question you were asked to answer?

14 A. That was my -- that was my hypothesis.

15 Q. Okay. And it appears in your conclusion
16 section that it says, "The answer to this question is
17 an unequivocal yes based upon the following reason."
18 And I guess I want to explore a little bit about the
19 bases that you used to draw that conclusion.

20 A. Okay.

21 Q. All right. So in Subpart A there you
22 describe the fact that Bear 646 had no known history of
23 interactions or conflicts; is that right?

24 A. That's correct.

25 Q. You state that, "As a male bear in the

1 prime of adulthood, Bear 646 likely had a long
2 established home range that encompassed part of the
3 Kitty Creek drainage including the area where he was
4 baited and captured." Do you see that?

5 A. I do see that.

6 Q. Now, what sort of veterinary principles
7 did you use to base that on?

8 A. I was not using veterinary principles
9 there. I'm using principles that -- if you recall from
10 my CV, I was also trained as a -- trained as a
11 biologist.

12 Q. Okay. And so what do you use as the
13 basis for that statement then?

14 A. Knowledge on the, you know, life history
15 of grizzly bears.

16 Q. And that being what? Please expand.

17 A. Well, can you tell me what it is you
18 want me to expand on in particular?

19 Q. That the home range included the Kitty
20 Creek drainage.

21 A. Okay. The home range -- now, I say
22 likely. So that doesn't -- it's a probability thing.
23 But within grizzly bears they're a species that do
24 have -- males and females do have established home
25 ranges by the time they become adults. Typically,

1 females have smaller home ranges than males. Males'
2 home ranges encompass multiple females. So they will
3 travel. They will travel around, overlap with other
4 females' home ranges.

5 And based then on the age of that --
6 based on the age of animal, the fact it's a mature
7 adult, I'm speculating based on my knowledge of grizzly
8 bear ecology, bear ecology in general, that that animal
9 probably had a well-established home range, which is in
10 contrast to a juvenile bear that has been -- basically
11 it's been dependent on its mother for two to three
12 years. And suddenly it's -- you know, it's kicked out
13 of the nest, and it disperses. It goes out seeking --
14 seeking a place to establish its home range. So a bear
15 in that case would be a bear that's transient.

16 Q. Okay. And you state that, "Bear 646
17 would likely have had ample opportunity to interact
18 with people and their property." What do you base that
19 statement on?

20 A. If that animal did have its home range
21 that encompassed part of that Kitty Creek drainage,
22 from what I've seen of the maps and the investigation
23 report and that, that there's human activity in that
24 landscape. There's human activity in the home range of
25 that bear. So based on its age, based on having an

1 established home range, based on the fact that that
2 home range is also being used by humans and that
3 there's also structures that are built by humans, then
4 I think there would be opportunity for that animal.

5 Q. And by virtue of the word "interact,"
6 you're not testifying here that interact means that the
7 bear likely would have been within 50 feet of a human
8 prior to June 17th, are you?

9 A. I'm not saying anything about distance
10 or anything. When I say interact, it's -- when I say
11 with people and their property -- so when I said
12 people, I'm thinking of, you know -- I mean, if it's a
13 cabin owner and they're out on their porch and they see
14 large adult male traverse the -- traverse the property
15 or damage some of the property or charge towards them.

16 Q. Okay. When you state that it's
17 reasonable to assume that Bear Number 646 and Mr. Evert
18 shared the same landscape over a long period without
19 incident, the same qualification would stand there too.
20 Correct? That is, you're not making the argument that
21 it's likely Mr. Evert had been within 50 feet of Bear
22 646 before June 17th, are you?

23 A. No, I'm not making that argument.

24 Q. You're aware, aren't you, that indeed
25 there have been maulings that have occurred with bears

1 that have no known history of interactions or conflicts
2 with humans?

3 A. Yes, I'm aware of that.

4 Q. All right. The second part of the
5 subletter B here of the basis for your conclusion, it
6 discusses how when Mr. Dickenson and Mr. Thompson first
7 interacted with Bear 646 they described it as charging
8 at them at times. Do you see that?

9 A. I do see that.

10 Q. As well as trying to escape. Do you see
11 that?

12 A. I do see that.

13 Q. All right. And then the next sentence
14 you say, "The likely explanation for this sudden
15 aggressive behavior in an adult bear with no prior
16 history of conflict with humans is severe stress and
17 trauma."

18 A. I do see that.

19 Q. Wouldn't you agree that a grizzly bear
20 in close proximity to a human would have that normal
21 response, either fight or flight?

22 A. I would agree that there is -- that it
23 would have a response to the persons. But the -- what
24 comes first, fight or flight? I don't know what. But
25 I do know if it's flight response -- I mean, the animal

1 perceives it has avenues of escape. And I think in
2 normal circumstances where an animal has not been --
3 has not been captured and restrained for a period of
4 time, that will choose -- it will choose a flight
5 response over a fight response.

6 Q. And what do you base that on?

7 A. I base that on again as -- you know, as
8 a biologist, it's not a -- it's not an evolutionary
9 sound strategy to fight every time there's a potential
10 interaction with a -- or an interaction with a
11 potential enemy. There's a cost to fighting. Where
12 fleeing there is not -- there is not a cost. Now, if
13 an animal has an to opportunity to flee, it will flee.

14 Q. But you just testified that you're aware
15 of instances where there have been maulings that have
16 occurred with bears that have not had any interactions
17 with humans before.

18 A. That's correct. I'm aware of that, but
19 what I'm not aware of -- when those happen, what you
20 need to know is you need to know the whole history on
21 the animal. You need to know what happened before.
22 Just because somebody's written down a few paragraphs
23 say that this animal has never had a conflict with a
24 person before and suddenly attacks a person, that
25 doesn't say much.

1 I mean, you need to do necropsy on the
2 animal, a full necropsy. Was this a diseased animal?
3 Has it been exposed to porcupines and had quills in it?
4 I mean, there's a lot more that goes into it than just,
5 you know, whether or not an animal attacked or ran
6 away.

7 Q. Are you saying there's studies out there
8 that discuss other issues that are going on in a bear
9 like porcupine quills that make it more aggressive?

10 A. No one said anything about other
11 studies. I'm saying when there's an event like that,
12 we're often limited on the information we have. Okay?
13 We may not be limited on the information on the person,
14 but we're certainly limited on the information on the
15 animal. And the best you can do in terms of obtaining
16 information is to do a complete -- complete necropsy,
17 have a board-certified pathologist do it. Follow up on
18 everything that's found and see if there's a plausible
19 explanation there. But, you know, even with that,
20 things are missed.

21 Q. Okay. I appreciate the expansion there.
22 But more directly to the question, what is it that
23 provides you the basis for the opinion that you've
24 expressed that a bear is more likely to flee than
25 fight?

1 A. Experience.

2 Q. All right.

3 A. I have encountered bears. I've
4 encountered bears at close hand and numerous times,
5 black, grizzly, and polar bears. And the choice has
6 been -- the choice has been for them to flee as opposed
7 to attack.

8 Q. And you're aware that other instances
9 have occurred in which they've actually attacked
10 instead of fled. Correct?

11 A. Of course I'm aware of that.

12 Q. All right. In fact, this bear -- at
13 least in your report here was described as attempting
14 to flee as well?

15 A. That's correct.

16 Q. All right.

17 MS. RANKIN: I'll just object as to
18 time.

19 MR. MARTIN: Okay. You can object.

20 Q. (BY MR. MARTIN) "Bear 646 had been held
21 by a leg-hold snare for hours." I think we've
22 established that's not necessarily established in the
23 record. Correct?

24 A. Not necessarily established in the
25 record, yeah.

1 Q. All right.

2 A. I concede that point.

3 Q. All right. You stated that, "It had
4 been trying to escape and that" -- in fact, you used
5 the word, "This was a fight or flight response."
6 Correct?

7 A. That's correct.

8 Q. Your I guess last sentence here says,
9 "Then four or five hours later Bear 646 was recovering
10 from anesthesia to the point of being able to ambulate
11 and was approached again by a human, this time
12 Mr. Evert." All right. And then you state that, "Bear
13 646 elicited the same stress response, but this time
14 there was no snare to restrain his charge."

15 What is it that provides you the basis
16 for the statement that the Bear 646 was more likely to
17 then charge on attack as opposed to flee this time?

18 A. The basis for that -- and I mean, you
19 know, in some situations a bear -- I will concede a
20 bear may decide to flee. But the basis for that is the
21 fact that prior to Chad Dickenson and Seth -- is it
22 Seth Thompson -- approaching the animal, that animal at
23 that point in time had been subjected to a leg-hold
24 snare, had not had any interaction with people. I
25 don't know. I mean, this is what -- this is what I'm

1 seeing. This is based on the understanding I have of
2 bears as a biologist and based on -- some of this stuff
3 obviously is based on being a veterinarian.

4 So I'm saying okay. I'm trying to
5 picture what happened. I'm seeing a bear that as of
6 yet -- it has come up to a site. There's some
7 attractant there. It's a pail-set snare. So it's
8 caught in a snare. But there's no association at this
9 point with people. Then along come two people. The
10 animal then is darted, and then it's subjected to a
11 period of handling which involves sampling, collecting
12 measurements, those sort of things over a couple hours'
13 period. Then those people leave.

14 When they're leaving, the animal is
15 showing some signs of recovery. They both say that the
16 animal is -- was aware of their presence. They go.
17 The stimulation I think -- I think the stimulus of
18 trying to get up and that is gone. The animal is there
19 metabolizing -- metabolizing the drugs, slowly
20 recovering.

21 And at some point another person comes
22 along, and the animal at that time -- okay. Now, I've
23 got the association not just with being restrained by a
24 trap, but I also have an association with people. And
25 people do bad things and that people -- that bear --

1 that bear chooses to attack.

2 Now, do I know this? Can I say that
3 there's a certain percent chance this is true versus
4 not true? No. It's just -- again, it's based on my
5 experience with the animal, and it's based on my
6 experiences with what I see with the animal's response
7 when handling the animals.

8 Q. Now, you stated that when Mr. Evert
9 arrived his presence elicited the same stress response
10 as the team that had been there earlier. Correct?

11 A. That's correct.

12 Q. That same stress response included an
13 attempt to escape. Correct?

14 A. That's correct, fight or flight
15 response, yep.

16 Q. So my question again to you is: What is
17 it that leads you to draw the conclusion that the same
18 stress response, which apparently included an attempt
19 to escape previously, was now because of the handling
20 event meant that he was going to attack instead of
21 flee?

22 A. There's nothing that says to me that --
23 you know, that it's definitely going to attack versus
24 flee. I mean, the animal could have fled as well. But
25 I think given the fact that it's now -- now it's not

1 only had the experience of being trapped, restrained by
2 a trap, but it's also had a very negative experience
3 with people. I think it still -- and I would even say
4 that the animal may not realize that it's free. And I
5 think it's just whatever, you know. It's like flipping
6 a coin on its head. It decides attack, and it attacks.

7 Q. Well, and I understand that's what you
8 think. I guess in order for your conclusion to be
9 admissible, what we're looking for is scientific
10 evidence that ties the theory that you have with the
11 conclusion that you make. Your conclusion was yes,
12 unequivocally that the recent capture and handling of
13 Bear 646 made it more likely to attack someone than if
14 it had not been recently handled and captured.

15 And what I'm looking for is the basis of
16 your statement that yes, that that took place, that he
17 was more likely to attack than flee.

18 MS. RANKIN: Object to the form.

19 A. Okay. So just give me just the
20 questions succinctly, please.

21 Q. (BY MR. MARTIN) What made it more likely
22 that Bear 646 was going to attack someone as opposed to
23 flee from someone?

24 A. I would not know what makes it more
25 likely to attack versus to flee. What I do know is

1 that based on what the animal had gone through it would
2 be likely to elicit stress response. But what that
3 stress response is, that immediate response, whether
4 it's fight or flight, I don't know. I don't know what
5 goes through a bear's mind. And I don't think there's
6 any scientific knowledge available out there that could
7 say with certainty.

8 Q. Okay. That's fair. And I guess that's
9 my follow-up question, is whether or not the theory or
10 hypothesis -- I don't mean to mince words with the
11 term -- you corrected me on it earlier, and I
12 appreciate it. But there's no study that you're aware
13 of that demonstrates a recent capture/handling event of
14 a bear would make it more likely to attack someone, is
15 there?

16 A. There is no -- no, I'm not aware of any
17 scientific study on that. I'm aware of anecdotal
18 statements that, you know, when this bear was
19 recovering even within the project that the bear
20 attacked the culvert trap. I actually have some video
21 footage from a project in Europe that shows a
22 recovering bear attacking a vehicle from which it was
23 darted from. So there are things like that. But to
24 do -- to my knowledge, nobody's done a scientific study
25 on this.

1 Q. Sure. I understand. But a bear
2 attacking during an event, you've not got any studies
3 that correlate the fact they're being handled is the
4 reason they're attacking?

5 A. There -- no, I said there are no studies
6 on that, but --

7 Q. And there's -- go ahead.

8 A. But I think -- I think, you know, if you
9 want me to give you another scenario. If one of us had
10 a pet dog in here and I was to go up and pat that pet
11 dog and then go up a couple minutes later and kick that
12 dog and go up a couple minutes later and kick that dog
13 and that dog realizes it has no avenue of escape, in
14 all likelihood at some point that animal is going to
15 attack me to defend itself.

16 So it's that kind of -- it's that kind
17 of thinking that goes behind and then the experience.
18 Like I say, seeing bears in the past that have -- that
19 have gone after -- gone after the helicopter during
20 recovery. The animals know -- they know what's
21 happened to them. That's my belief. But --

22 Q. Back to the scenario, though. However,
23 when they do have an avenue for escape, there's nothing
24 that you're aware of that has been studied,
25 peer-reviewed, and published that demonstrates that a

1 bear that's recently captured or handled is more likely
2 to attack than flee, is there?

3 A. That's correct. There's nothing that
4 I'm aware of.

5 Q. And there's no way to establish a known
6 rate of error for that?

7 A. That's correct.

8 Q. And so the theory or hypothesis that a
9 recently captured and handled bear is more likely to
10 attack than flee, that's not something that's been
11 accepted in the scientific community, is it?

12 A. No. That's correct. These conclusions
13 here -- these are the conclusions based on putting all
14 my opinions together, trying to understand in my own
15 head what probably happened. So that's what they are.
16 Now, the opinions are backed up, you know, and are
17 appropriate with references to the scientific
18 literature. But in putting all these opinions
19 together, no, it's the best speculation I can make
20 based on my -- based on my own experience as well as
21 based on what's in the literature.

22 MR. MARTIN: Okay. Give me just a
23 couple minutes. I think I'm done.

24 MS. RANKIN: Okay.

25